JONES DAY

APRIL 2014

COMMENTARY

The Rise of Parallel Proceedings in Health Care Fraud Investigations: How to Tell When You're a Target

Introduction

When Dewey & LeBoeuf lawyer Zachary Warren was indicted for fraud recently, his surprised reaction made headlines.[1] Warren, the *New York Times* reported, had spoken with government investigators without the assistance of counsel because he believed he was being questioned as a potential witness in a civil Securities and Exchange Commission ("SEC") investigation. He never imagined he might be the target of a parallel criminal investigation. By the time he realized what was happening, it was too late to undo the damage.

Mr. Warren's predicament likely will resonate with members of the health care industry. Although "parallel proceedings"—a shorthand term for simultaneous criminal, civil and administrative investigations—are a widespread government practice, health care matters lend themselves to a collaborative, team investigative approach with particular frequency. Long-standing Department of Justice ("DOJ") policies promote early collaboration and information sharing between its criminal and civil divisions, as well as between the criminal and civil divisions of each individual U.S. Attorney's office. The policies instruct prosecutors to "ensure maximum recovery" in health care fraud investigations by pursuing criminal, civil and administrative sanctions.[2] A typical DOJ investigation into a health care matter will accordingly involve criminal prosecutors, counsel representing the Department of Health and Human Services ("HHS"), attorneys from DOJ's civil division, and civil Assistant U.S. Attorneys ("AUSAs"). The government increasingly employs a three-pronged strategy: it prosecutes responsible companies and persons, collects civil damages and penalties from those same targets, and imposes administrative sanctions such as exclusion from federally funded programs or compliance agreements.

Many of the government's recent settlement announcements conform to the parallel proceedings model. Indeed, since May 2012, there have been at least five settlements of parallel proceedings in health care matters where the total amount paid by the defendant exceeded $100 million.[3]

1 *See* James B. Stewart, *A Dragnet at Dewey LeBoeuf Snares a Minnow*, N.Y. TIMES, Mar. 14, 2014.

2 U.S. ATTORNEYS' MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 978, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00978.htm.

3 *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES AND DEPARTMENT OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT 25-26 (2013).

The government's use of parallel investigations, however, is not limited to such big-ticket proceedings. In light of DOJ policies regarding information sharing and cooperation between civil and criminal prosecutors, there is always the potential for a health care case to develop into a parallel proceeding. Given that possibility, it is essential that health care companies remain aware of this potential risk and take steps to avoid the mistake of realizing too late that a government investigation is proceeding on more than one track. This article discusses the current administration's renewed emphasis on parallel proceedings and explains how to identify and effectively negotiate a health care fraud investigation with criminal, civil, and administrative components.

An Emphasis on Collaboration Between the Criminal and Civil Divisions

Although parallel proceedings are by no means new phenomena, under the current administration they have become more prevalent. DOJ policies in place since 1997 instruct its attorneys to maximize government resources by fostering "greater cooperation, coordination and teamwork between the criminal and civil prosecutors who are often conducting parallel investigations of the same offenders and matters."[4] In January 2012, Attorney General Eric Holder issued an updated memorandum ("Holder Memorandum") placing even stronger emphasis on parallel proceedings.[5] The Holder Memorandum mandates information sharing between the civil and criminal divisions "to the fullest extent appropriate to the case and permissible by law." As a result, every single case referral—including an agency referral, a self-disclosure, or a *qui tam* action—is now expected to be shared between the civil and criminal divisions. Further, the Holder Memorandum instructs prosecutors to use investigative strategies that increase the government's ability to share information among criminal, civil and agency administrative teams whenever possible. In practice, this results in more administrative subpoenas, search warrants and witness interviews outside of the grand jury process.

Although the Holder Memorandum applies to all types of parallel proceedings, it has a particularly powerful effect in health care fraud investigations. In 2010, as part of the Affordable Care Act ("ACA"), Congress relaxed some of the jurisdictional requirements for bringing *qui tam* actions.[6] The result has been a dramatic increase in the number of *qui tam* actions filed. During the decade prior to these amendments, the number of *qui tam* cases consistently ranged from 300 to 400 per year. In the past two years, new filings have nearly doubled; in 2011, there were 638 new *qui tam* cases filed, and last year new filings hit an all-time high of 647.[7] In 2011 and 2012 alone, *qui tams* resulted in recoveries totaling more than $6.1 billion.[8] The practices set forth in the Holder Memorandum mean that, in practice, all of these *qui tam* filings should be brought to the attention of DOJ's criminal division. In other words, more than 300 cases that were once considered purely civil are now being shared with, and likely investigated to some degree by, the criminal division at DOJ each year.

Does the government have the power to share information when conducting parallel civil and criminal proceedings? In general, the answer is yes. Absent evidence of bad faith or trickery on the part of the government or special circumstances indicating that the rights of the investigated party will be prejudiced, courts have approved cooperation and information sharing between civil and criminal investigators.[9] In *United States v. Kordel*, the Supreme Court observed that "[i]t would stultify enforcement of federal law to require a government agency . . . invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the outcome of a criminal trial."[10] More recently, in *United States v. Stringer*, the Ninth Circuit unequivocally condoned the government's practice of mounting an investigation on two fronts, stating, "[t]here is nothing improper about the government undertaking simultaneous criminal and

4 Memorandum from the Attorney General to U.S. Attorneys et al., July 28,1997, *available at* http://www.justice.gov/ag/readingroom/970728.htm.

5 Memorandum from the Attorney General to U.S. Attorneys et al., Jan. 30, 2012, *available at* http://www.justice.gov/usao/eousa/foia__reading__room/usam/title1/doj00027.htm.

6 *See* 31 U.S.C. §§ 3730(e)(4)(A), (B).

7 Department of Justice, Civil Division, Fraud Statistics: Overview (Dec. 23, 2013) *available at* http://www.justice.gov/civil/docs__forms/C-FRAUDS__FCA__Statistics.pdf.

8 Press Release, Department of Justice, Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html; Press Release, Department of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), available at http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.

9 *See United States v. Stringer*, 535 F.3d 929, 937-41 (9th Cir. 2008).

10 397 U.S. 1, 10 (1970).

civil investigations[.]"[11] In light of the government's authority and propensity to investigate health care companies for violations of both civil and criminal health care fraud statutes, it is imperative to approach any government investigation as a potential parallel proceeding. In short, health care companies must be prepared to wage a two-front war.

Telltale Signs of a Parallel Proceeding

In order to develop an effective strategy in response to parallel proceedings, the target of the investigation first must recognize its situation. How do you know when a matter is proceeding on multiple tracks? One way is simply to ask the civil or criminal AUSA handling the investigation. In cases where the government is not using covert operations or undercover agents, investigators often will discuss the status of the case. It is important to recognize, however, that even when a health care fraud investigation is classified as purely "civil" or purely "criminal" at the outset, it may evolve into a parallel proceeding as the investigation matures. In such cases, or when prosecutors decline to share information, the investigative tools employed by the government can provide insight: some tools allow for sharing of information between civil, criminal, and administrative investigators, while others do not.

Use of a HIPAA Administrative Subpoena Instead of a Grand Jury Subpoena. Many criminal health care fraud investigations remain covert for months or even years while prosecutors gather evidence through consensual monitoring, confidential sources, or wiretaps. Once an investigation becomes overt, however, the first step is often the issuance of a subpoena.

If that subpoena is issued under the Health Insurance Portability and Accountability Act of 1996 (a "HIPAA subpoena"), there is an increased likelihood of a parallel proceeding. HIPAA granted DOJ the authority to issue administrative subpoenas when investigating federal health care offenses, and this authority has led to information sharing among various "health oversight agencies," including DOJ, individual U.S. attorney's offices, the Federal Bureau of Investigation ("FBI"), and the HHS Office of the Inspector General ("HHS-OIG").[12] In contrast to a grand jury subpoena, which will only be issued at the behest of criminal investigators, HIPAA subpoenas may be issued by civil investigators as well, provided that there is some nexus to a pending criminal investigation.[13] In addition, grand jury subpoenas restrict a criminal prosecutor's ability to share information with her civil counterparts.[14] A HIPAA subpoena, on the other hand, carries no such restrictions. They are therefore a favored tool for information gathering in parallel proceedings.

Execution of a Search Warrant. Like HIPAA subpoenas, any evidence obtained by the criminal prosecutor pursuant to a search warrant can be shared with colleagues in the civil division, provided that the criminal search warrant was not simply a pretext to advance the civil investigation. Although search warrants are a purely criminal investigative tool, the Holder Memorandum specifically identifies search warrants as a mechanism to gather evidence that can (and should) be used to advance both criminal and civil proceedings.

Use of Unsworn Witness Interviews Rather than Grand Jury Testimony. Federal grand juries conduct their business in secret, and "matters occurring before the grand jury" are subject to various disclosure restrictions.[15] Most importantly, criminal prosecutors may not share with their civil counterparts the substance, or even the existence of, testimony by witnesses appearing before the grand jury.[16] Given this restriction, prosecutors involved in a parallel proceeding are likely to attempt informal witness interviews at the outset of an investigation so that any information gleaned from the interviews can be used to advance the case on both civil and criminal fronts.

11 *Stringer,* 535 F.3d at 933. *See also SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (en banc) ("In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.").

12 *See* 18 U.S.C. § 3486; 45 C.F.R. § 164.512(d)-(e); 65 Fed. Reg. 82,462, 82,492 (Dec. 28, 2000).

13 *See* 18 U.S.C. § 3486(a)(1)(A)(I) (authorizing issuance of subpoenas "[i]n any investigation of . . . a Federal health care offense") (emphasis added); 18 U.S.C. § 24.

14 *See* Fed. R. Crim. Proc. 6(e). One important statutory exception to the general rule of secrecy of grand jury proceedings is a provision of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that allows government attorneys to disclose such information when enforcing FIRREA or in connection with any civil forfeiture provision of federal law. 18 U.S.C. § 3322.

15 Fed. R. Crim. P. 6(e). *See also United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411-14 (9th Cir. 1993).

16 *See*, *e.g.*, *Dynavac*, 6 F.3d at 1411-14 ("Rule 6(e) is intended only to protect against disclosure of what is said or takes place in the grand jury room."). An exception, as noted above in footnote 14, is set forth in FIRREA.

Other Investigative Tools. Other types of government process in health care fraud investigations tell the target less about the nature of the ongoing investigation. For example, the government often issues Civil Investigative Demands ("CIDs") in health care fraud investigations pursuant to the False Claims Act ("FCA").[17] CIDs became far more common in health care fraud investigations after the 2009 enactment of the Fraud Enforcement and Recovery Act, which allowed the Attorney General to delegate authority to issue CIDs to the U.S. Attorneys.[18] For investigators, CIDs have an advantage over HIPAA subpoenas in that in addition to requiring the production of documents, they can also demand interrogatory responses and that witnesses appear for depositions.[19] Although CIDs were conceived as a tool of civil discovery under the FCA, the information obtained through a CID can arguably be shared by the government attorneys conducting the civil side of an investigation with prosecutors conducting the criminal side of an investigation.[20]

In most cases, therefore, a party served with a CID will not be able, without further inquiry, to assess the nature of the ongoing proceedings. The case may remain purely civil, or it may be that information from a CID will be shared with criminal investigators after a civil inquiry identifies evidence suggesting a crime occurred. At times, civil investigators may take the lead on an investigation that they know has potential to become a criminal matter, although in such cases, investigators run the risk of subsequent court sanction if they fail to manage the parallel proceedings responsibly.[21] The party under investigation will simply have to wait and see, and in the meantime act prudently and proceed with caution.

The same is true when the HHS-OIG issues a subpoena in a health care matter. Although there are some limits to the OIG's ability to obtain records, HIPAA broadened the OIG's authority to issue subpoenas so that it now covers not only Medicare and Medicaid but all matters involving program-related fraud and abuse.[22] In light of the concerted efforts the administration has made to coordinate administrative proceedings with civil and criminal ones, it is always possible that an administrative investigation could develop into a parallel proceeding with a criminal component.

Negotiations in a Parallel Proceeding

Defense Counsel Must Initiate a Global Resolution. Once you have identified a health care fraud case as a parallel proceeding, it is critical to include all components of the investigative team in your negotiations. The first step in moving toward a resolution with the government is to request a global resolution of all existing matters under investigation.

The second step is to make sure that any agreements—whether civil or criminal—include language that binds other U.S. Attorney's Offices or DOJ divisions.

Finally, the third step is to resolve administrative and collateral consequences, including the potential for suspension or debarment (in cases where the target has a contract with the government), or exclusion (in cases where the target is a health care provider participating in federal health care

17 *See* 31 U.S.C. § 3733.

18 *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, §4(c), 123 Stat. 1623 (2009).

19 *Compare* 18 U.S.C. § 3486 (a)(1)(B) (subpoenas may be issued requiring the production of records and things relevant to the investigation as well as testimony authenticating such materials), *with* 31 U.S.C. § 3733(a)(1) (subpoenas may be issued requiring production of documentary material, answers to written interrogatories, or oral testimony).

20 *See* 31 U.S.C. §§ 3733(i)(2)-(3), (l)(8) (establishing procedures for sharing information for "official use" and defining "official use" as including "a Department of Justice . . . prosecution of a case"). The parameters for any such sharing have yet to be precisely established. Despite the expression of concern from some quarters, *see*, *e.g.*, U.S. CHAMBER OF COMMERCE, FIXING THE FALSE CLAIMS ACT: THE CASE FOR COMPLIANCE-FOCUSED REFORMS 48 (2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Fixing__The__FCA__Pages__Web.pdf (urging DOJ to "adopt guidelines to guard against misuse of the CID provisions to ensure that CID information is not improperly employed to aid in a criminal investigation"), DOJ has not yet issued regulations or guidelines addressing the issue.

21 Courts have made it clear that criminal investigators may not manipulate a civil investigation in order to gather information for their own purposes. While it will generally be permissible to use information obtained through civil investigative means in a criminal investigation if the subject had notice that the information might be used in criminal proceedings and there is no evidence of government bad faith, *see Stringer*, 535 F. 3d at 940, courts have found bad faith where criminal investigators gave direction to civil investigators in an ongoing matter, *see*, *e.g.*, *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005); *SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298 (N.D. Ala. 2003). The government is therefore on firmer ground when the civil investigation is well underway before information is shared with criminal authorities. *See Stringer*, 535 F.3d at 939.

22 *See* 5 U.S.C. app. §§ 3. 6; 42 U.S.C. § 1320a-7c(a)(4).

programs). Only by negotiating with civil and criminal DOJ officials as well as the affected agency can you achieve a truly global resolution.

Remember that the Civil and Criminal Divisions Have Different Burdens of Proof and Different Policy Goals. In negotiating a global resolution in a health care fraud investigation, it is important to bear in mind that criminal, civil, and administrative authorities have different policy mandates, different burdens of proof, and different sanctions at their disposal.

On the civil side, settlement agreements typically focus on the damages calculation, thus allowing the parties to settle the case without a lengthy recitation of facts that would serve as a basis for liability. With that said, the government's burden of proof in a civil case is by a preponderance of the evidence rather than beyond a reasonable doubt. The range of conduct at issue in a civil matter, therefore, is often significantly broader than in a criminal one—and the potential damages are therefore often much higher.

In contrast, criminal settlements generally require a defendant to admit specific facts that establish liability. Most written plea agreements also include admissions by the defendant that all of the facts are true, and that the government could prove all such facts by admissible evidence at trial. The types of resolutions available on the criminal side are: (1) a Declination; (2) a Non-Prosecution Agreement ("NPA"); (3) a Deferred-Prosecution Agreement ("DPA"); and (4) a Plea Agreement.

- **Declination:** Simply stated, a declination occurs when DOJ, for any number of reasons, declines to prosecute a criminal case. The decision to decline a case may be based on factual shortcomings, evidentiary hurdles, or policy reasons.

- **Non-Prosecution Agreement ("NPA"):** An NPA is a written agreement with the potential defendant, typically a corporation, where the government agrees not to file criminal charges. An NPA usually contains a statement of facts that a defendant must admit, and can require corporate defendants to pay fines or introduce new or enhanced compliance measures.

- **Deferred Prosecution Agreement ("DPA"):** A DPA is different from an NPA in two important respects. First, a DPA is filed with the court and made part of the public record. Second, a DPA is accompanied by a criminal charging document (e.g., an indictment or information). The term "deferred" is used because after filing the charging document and agreement, the government postpones any action on the case for a specified period of time (usually between one and three years). If the defendant complies with the terms set forth in the DPA, the government will move to dismiss the information or indictment at the end of the DPA period. Like an NPA, the DPA often contains a detailed factual basis that the defendant must admit. But unlike the NPA, these facts are open to public view. Indeed, now that most courts make all electronically filed documents available online for a nominal fee, DPAs and charging documents are readily accessible.

- **Plea Agreement:** A plea agreement is a written agreement wherein a defendant agrees to plead guilty to a crime. Because plea agreements save prosecutors time and resources by avoiding trial, they often include concessions from the government (e.g., allowing a defendant to plead guilty to a lesser charge, or agreeing to recommend a specific sentence).

When negotiating pretrial resolution of cases against health care companies, including where parallel civil and criminal cases are underway, the government typically has required the company to agree to compliance measures aimed at avoiding future violations of health care law. In the past, the responsibility for monitoring such compliance initiatives was generally left to HHS-OIG through its Corporate Integrity Agreement ("CIA") program. In recent settlements, however, DOJ increasingly has included compliance requirements in plea agreements, DPAs and NPAs, rather than agency monitored CIAs. By making compliance measures a prerequisite to the resolution of parallel proceedings, DOJ has added teeth to its settlement agreements. If a company breaches the conditions of a CIA, the HHS-OIG may pursue only administrative sanctions. In contrast, a breach of a condition in a criminal plea agreement or DPA can result in the filing of new criminal charges. In short, when compliance requirements are supervised by DOJ, whether in a civil or criminal agreement, any breach brings with it the potential for more severe consequences than those typically found in a CIA.

Confront Collateral Consequences as Early as Possible. For government contractors and health care providers, the collateral consequences associated with a health care fraud investigation are often more frightening than a large monetary settlement or criminal conviction. The prospect of being excluded from Medicare or debarred from future government business can be a death knell for a health care company whose existence is dependent upon billing federal health care programs or obtaining future government contracts. Importantly, exclusion and debarment decisions are not controlled by the DOJ; to the contrary, the decision to exclude a provider or debar a government contractor rests with the contracting agencies. That said, in criminal matters, the *type* of resolution reached with DOJ and the *scope* of the factual basis in any agreement are two critical factors impacting exclusion and debarment. Likewise, in civil settlements, HHS-OIG considers ongoing corporate efforts to fight fraud and adherence to agency compliance program guidance.[23]

- **Exclusion:** Exclusion is mandatory for convictions of certain criminal offenses, including so-called "program-related crimes," and crimes "relating to patient abuse."[24] Mandatory exclusion also applies to felony convictions relating to health care fraud or controlled substances. In contrast, where there is no conviction (i.e., where the parties have negotiated a DPA or NPA rather than a plea agreement), HHS-OIG can exercise its "permissive" authority to impose exclusion on a defendant.[25] Because the exercise of such authority is permissive, or optional, it is critical to include the HHS-OIG in discussions about a global resolution early in the process. In the case of a corporate defendant, the OIG may require the company to enter into a CIA with added compliance measures in exchange for waiving its permissive authority to exclude the company from federal health care programs.

- **Debarment:** Unlike exclusion from federal health care programs, the decision to suspend or debar a government contractor from future business with the government is entirely discretionary. The rationale behind suspension and debarment is to protect the government from unethical or irresponsible business partners and to ensure the federal government only does business with entities and individuals who are good stewards of taxpayer money. The government's stated policy is that debarment and suspension are to be "imposed only in the public interest for the Government's protection and not for purposes of punishment."[26] At the same time, however, the regulations governing suspension and debarment instruct the debarring official to consider such factors as "the seriousness of the contractor's acts or omissions," the extent to which the contractor has "agreed to pay all criminal, civil, and administrative liability for the improper activity," and "remedial measures or mitigating factors."[27] It is therefore clear that the government considers debarment and suspension in the context of the entire settlement, and the presence of a new compliance program or new corporate management may have a positive impact on the government's deliberations when deciding whether to suspend or debar a given company.

Conclusion

The Obama administration has made health care fraud cases a top priority since 2009. Attorney General Holder has boasted that the government's health care fraud investigations "have never been more innovative, collaborative, aggressive—or effective."[28] Cases that might primarily have been considered purely civil in the past, such as *qui tams*, are now jointly investigated by criminal prosecutors, and every year the health care industry sees multiple high-stakes parallel investigations initiated or resolved.

Health care companies must anticipate that the government will coordinate the civil, criminal, and administrative arms of its investigation and that it will take an aggressive approach to integrating civil, criminal and administrative sanctions. It is crucial to identify a parallel proceeding early so that companies can safeguard their rights and seek a global settlement that best advances their interests.

23 HHS-OIG occasionally issues letters to health care providers alerting them to OIG policies and providing compliance guidance. *See* Office of Inspector General, U.S. Department of Health & Human Services, Open Letters, http://oig.hhs.gov/compliance/open-letters/index.asp (last visited Apr. 7, 2014).

24 42 U.S.C. § 1320a-7(a).

25 42 U.S.C. § 1320a-7(b).

26 48 C.F.R. § 9.402(b).

27 48 C.F.R. § 9.406-1(a).

28 Press Release, Department of Justice, Two Houston-Area Residents Charged in Nationwide Medicare Fraud Strike Force Takedown (Sept. 7, 2011), *available at* http://www.justice.gov/usao/txs/1News/Releases/2011%20September/110907%20HCF%20Strike%20Force.htm.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Shireen M. Becker
San Diego
+1.858.314.1184
sbecker@jonesday.com

Theodore T. Chung
Chicago
+1.312.269.4234
ttchung@jonesday.com

Heidi A. Wendel
New York
+1.212.326.8322
hwendel@jonesday.com

Hank Walther
Washington
+1.202.879.3432
hwalther@jonesday.com

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

Shawn Cleveland
Dallas
+1.214.969.3732
Houston
+1.832.239.3794
scleveland@jonesday.com

Heather M. O'Shea
Chicago
+1.312.269.4009
hoshea@jonesday.com

Matthew D. Orwig
Dallas
+1.214.969.5267
Houston
+1.832.239.3798
morwig@jonesday.com

Stephen G. Sozio
Cleveland
+1.216.586.7201
sgsozio@jonesday.com

Weston C. Loegering
Dallas
+1.214.969.5264
wcloegering@jonesday.com

Rebekah N. Plowman
Atlanta
+1.404.581.8240
rplowman@jonesday.com

Charlotte Taylor, an associate in the Washington Office, assisted in the preparation of this Commentary.